In the

Supreme Court of the United States

October Term, 1942.

No. 928

PICKERING LUMBER CORPORATION, a corporation,
Petitioner,

vs.

SOPHIA WHITESIDE, ROGER V. WHITESIDE, WILLIAM C. ROBINSON and JOHN D. LAMONT, as Executors of the Last Will and Testament of Robert B. Whiteside, deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE THIRD APPELLATE DISTRICT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

Table of Cases Cited.

Table of Statutes Cited.

Table of Constitutional Provisions Cited.

Table of Court Rules Cited.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Pickering Lumber Corporation, respectfully petitions this Court to grant a writ of certiorari to review the final judgment of the District Court of Appeal for the Third Appellate District of the State of California, being the highest court of that state in which a decision could be had, in the case of Pickering Lumber Corporation,

Plaintiff, Cross-Defendant and Respondent, vs. Sophia Whiteside, Roger V. Whiteside, William C. Robinson and John D. Lamont, as Executors of Robert B. Whiteside, Deceased, Defendants, Cross-Complainants and Appellants, 3 Civil No. 5705, Sac. No. 5418. The judgment sought to be reviewed adjudged that respondents, who were appellants in the court below, were the owners of certain lands and timber located in Tuolumne and Calaveras Counties, California (R. 157) and (R. 447) reversed the judgment of the Superior Court of Tuolumne County, California, the court of first instance, which decreed petitioner to be the owner of the lands free from any right, title, claim or interest of respondents (R. 157).

Petitioner was organized and acquired title to the lands in question in pursuance of a Plan of Reorganization (R. 49, 173) duly confirmed (R. 177, Ex. 20, R. 293) and a Final Decree rendered by the District Court of the United States for the Western District of Missouri (R. 179) in bankruptcy proceedings for the reorganization of Pickering Lumber Company under Section 77B of the Bankruptcy Act (Act of June 7, 1934, Section 1, 48 Stat. 912, as amended by the Act of August 20, 1935, 49 Stat. 644, and as amended by the Act of August 29, 1935, 49 Stat. 965, 11 U. S. C. A., Section 207.

Petitioner's title to the lands thus acquired in the bankruptcy proceedings, which had terminated prior to the institution of this suit, was specifically set up and claimed by it in the court of first instance (*infra*, p. 28; amended cross-complaint, R. 117, 128-135) and was sustained by that court (R. 157-161), but was denied on appeal by the court below in its decision (R. 447; *infra*, p. 16), and by the Supreme Court of California when it denied Petitioner's Application for Hearing After Final Judgment of a District Court of Appeal (R. 459; *infra*, p. 18).

Such right, title, privilege and immunity specifically set up and claimed in the Supreme Court of California (R. 468-492; *infra,* pp. 33-38) was denied on October 26, 1942, when that court refused to hear this case (R. 455). Petitioner also specifically set up and claimed in the court of first instance (R. 719, 128-135; *infra,* pp. 28-31) and the court below (R. 448-454; *infra,* pp. 31-33) and in the Supreme Court of California in Petitioner's Application for Hearing (R. 468-492; *infra,* pp. 33-38) that respondents' claims to the real estate were barred by the Plan of Reorganization and the Final Decree of the bankruptcy court and that such bankruptcy proceedings were *res judicata* of the claims asserted by respondents; and such plea of *res judicata* was denied by the court below (R. 455) and by the Supreme Court of California when it refused to review this case (R. 455).

The Plan of Reorganization (R. 49, 173) as confirmed, made specific provision for the satisfaction of the entire unpaid balance of purchase price (R. 64) on a purchase contract for the real estate in question entered into January 5, 1927, between respondents' decedent, Robert B. Whiteside, and his wife, as vendor, and Pickering Lumber Company as vendee (R. 32, 168). The Plan was accepted by the assignee of the purchase contract (R. 177, 170, Exs. 2, 3, 4 and 5, 184-214) and, in pursuance of the requirements of the Plan (R. 64), the assignee delivered a deed (R. 182, Ex. 1), vesting title to said real estate in petitioner (R. 180). The deed had been executed by Whiteside contemporaneously with the execution and pursuant to the purchase contract (R. 39) and had been held in escrow by the assignee (R. 168). The order confirming the Plan of Reorganization (R. 177, Ex. 20, R. 293, 301-302) and Final Decree barred all claims against Pickering Lumber Company, the debtor, and its property, including those

who had and those who had not filed claims (R. 179, Ex. 25, R. 327, 329). Respondents had notice of all of the proceedings (R. 173, 174, 176), knew of the provisions of the Plan (R. 176, 177), participated in the bankruptcy proceedings before the Final Decree was entered (R. 175, 179), but filed no claim therein (R. 175) and made no challenge either as to the jurisdiction of the bankruptcy court or the adjudication therein made of title and barring of claim. Instead, respondents claims were asserted in this suit subsequently filed.

The court below held that the bankruptcy court did not have jurisdiction to adjudicate title to the real estate which, under the admissions in the pleadings, was in the possession of Pickering Lumber Company on November 30, 1934, when its petition for reorganization was filed in the bankruptcy court, because that court did not have personal jurisdiction over respondents when the Final Decree was rendered (R. 434, 441-446). This conclusion was based on the erronous premise that Respondents' intervention was dismissed prior to the entry of the final decree when both the record (R. 332, 333) and the stipulation of facts (R. 180) show that such dismissal and final decree were entered simultaneously on the same day. Furthermore, this holding was made in the face of admitted facts that respondents had appeared in the bankruptcy court at the hearing upon the fairness and feasibility of the Plan of Reorganization and in open court had expressed approval of the Plan (R. 175), and of the admitted facts that respondents intervened in the bankruptcy proceedings in aid of the execution of the Plan of Reorganization (R. 179), and in such intervening petition respondents neither challenged the jurisdiction of the court nor did they in any way limit their appearance (Ex. 23, R. 310).

The court below held that, if the bankruptcy court

had jurisdiction of respondents, the Plan of Reorganization and Final Decree providing for the vesting of title in petitioner would have been effective to bar respondents, but that, inasmuch as the respondents were not parties to the "compromise plan or purported accord and satisfaction," its proceedings were ineffective to bar respondents' claim of title (R. 441-444). Petitioner's plea of *res judicata* was rejected upon the ground that respondents were not parties to the bankruptcy proceeding (R. 444-446).

The date of the rendition of the judgment sought to be reviewed and the date petition for certiorari is presented.

The date of the rendition of the judgment sought to be reviewed is August 29, 1942 (R. 447). It became final in the District Court of Appeals on September 28, 1942.[1] For purposes of review in this Court it became final when the Supreme Court of California, on October 26, 1942, denied Petitioner's Application for Hearing After Final Judgment of a District Court of Appeal (R. 455).[2]

This petition for certiorari is presented to this Court on the date the same is filed with the clerk of this Court.

A certified copy of the record, including the proceedings in the District Court of Appeal for the Third Appellate District of California and the proceedings in the Supreme Court of California, and additional copies of said record and proceedings, as required by Rule 38 of the Rules of this Court, have been filed with the clerk of this Court.

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[1]See Appendix, pp. 16-17, IV.

[2]That the judgment sought to be reviewed was final and was rendered by the highest court in the state in which a decision could be had is shown *infra*, pp. 16-18.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The Nature of the Case.

This suit was instituted by Petitioner in the Superior Court of Tuolumne County, California, on the 27th day of May, 1937 (R. 1), against Respondents in conventional statutory form, to quiet title to the lands in question. Respondents filed a cross-complaint asserting title to the lands (R. 8, 31). In its amended answer to the cross-complaint (R. 117), Petitioner alleged that it had acquired title to the lands by the Plan of Reorganization and final decree entered by the District Court of the United States for the Western District of Missouri in the bankruptcy proceedings for the reorganization of Pickering Lumber Company (hereinafter called the "Debtor"), that the claims of Respondents to said lands were barred by the order confirming the Plan of Reorganization and final decree, and that the latter were *res judicata* of the claims of the Respondents to the lands as set up in the cross-complaint.[1]

The Superior Court sustained Petitioner's claim to title and plea of *res judicata* (R. 157, 161), but on Respondents' appeal (R. 162) the court below held that the bankruptcy court had no jurisdiction to adjudicate the title in Petitioner and that the Plan of Reorganization, as confirmed, and the Final Decree were not *res judicata* of Respondents' claims to the real estate (Appendix, pp. 1, 7-16).

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[1]The stage in the proceedings in the court of first instance and in the appellate courts and the manner in which the federal questions sought to be reviewed were raised and the way that they were passed upon by the courts below is specifically dealt with (*infra*, pp. 28-42).

The Facts.

There are no controverted facts because at the trial in the Superior Court the parties filed a stipulation of facts (Ex. 1, R. 168) from which, together with the admissions in the pleadings, the facts hereinafter stated were all admitted. Except when otherwise stated, the facts herein referred to are set out in the stipulation which is Exhibit 1 (R. 168).

On November 30, 1934, when the Debtor filed its petition for reorganization under 77B of the Bankruptcy Act in the District Court of the United States for the Western District of Missouri (R. 171) it was in possession of the real estate in question (petition R. 2, answer and cross-complaint, R. 9), which it had purchased from Respondents' decedent, Robert B. Whiteside, and his wife, under a purchase contract dated January 5, 1927 (Ex. A to cross-complaint, R. 32, 168).

By the purchase contract, Whiteside agreed to sell the lands in question to the Debtor for total aggregate payments of $1,804,400, of which $404,400 was paid in cash upon the execution of the contract (R. 33), $600,000 additional was to be paid by the assumption by the vendee of an existing indebtedness of Whiteside secured by a first mortgage on the lands covered by the contract (R. 34) and the balance of $800,000 was to be paid in four annual installments of $200,000 each (R. 33). The purchase contract provided that the Debtor should be entitled to possession of the lands forthwith (R. 36), and it was admitted by the pleadings that the Debtor had possession from and after the execution of the contract (petition R. 2, answer and cross-complaint R. 9).

Contemporaneously with the execution of the purchase contract, Whiteside and his wife executed a deed conveying the lands to the Debtor and delivered the same to the

First National Bank of Duluth, Minnesota (Ex. A attached to cross-complaint, R. 32, 39, 168-9, Ex. 1, R. 182) (afterwards consolidated under the name of First and American National Bank of Duluth (R. 169), hereinafter called the "Duluth Bank"), which was to be kept in escrow and to be delivered to the Debtor by the Duluth Bank when the entire purchase price fixed by the purchase contract had been paid (Ex. A to cross-complaint, R. 39).

On January 5, 1928, Whiteside borrowed $400,000 and on July 5, 1928, he borrowed an additional $200,000 from the Duluth Bank and to evidence such loans he executed his notes (R. 170-1).

When the first loan was made Whiteside executed two instruments, one a collateral trust agreement and the other an assignment conveying to the Bank $400,000 of the annual installments of the unpaid purchase price under the purchase contract and when he made the second loan he executed two other instruments of like character under which he conveyed to the Duluth Bank $200,000 of the annual installments of the unpaid purchase price under the purchase contract (R. 170). All four instruments together conveyed to the Duluth Bank as trustee the entire amount of the unpaid purchase price under the purchase contract, exclusive of the assumption of the payment of Whiteside's debt secured by the first mortgage on the land (Ex. 2, R. 184, Ex. 3, R. 206, Ex. 4, R. 307, Ex. 5, R. 213). These assignments and instruments assigned all of the rights conferred upon Whiteside by the purchase contract insofar as the same may be necessary or applicable to enforce payment by Debtor of the entire unpaid balance of the purchase price (R. 206, 213).

On Whiteside's death, in 1931 (R. 169), Respondents qualified as Executors under his will both in Minnesota

and in California (R. 169-70). Under the laws of California, they were authorized to assert and defend title to real estate owned by their decedent.[1]

When Debtor filed its petition for reorganization on November 30, 1934, there was unpaid on the purchase contract $300,000 principal amount, together with accrued interest, which was identically the same as the amount unpaid on the Whiteside notes for which the purchase contract had been assigned to the Duluth Bank (R. 170).

At the time of the institution of the bankruptcy proceedings, $200,000 principal amount of the notes issued by Whiteside had been assigned to the Noteholders' Protective Committee for which the Duluth Bank acted as Trustee under the assignment and $100,000 principal amount was then owned by the Duluth Bank (R. 171-2). As the owner of $100,000 principal amount of the notes the Duluth Bank filed claim in the bankruptcy proceedings upon $100,000 of the unpaid balance of the purchase contract, with interest (R. 174), and, as trustee and assignee of the purchase contract, it filed a claim in the bankruptcy proceedings for $300,000 principal amount, plus interest (R. 174), being the total unpaid balance of the purchase contract and the entire unpaid balance of the Whiteside notes. The Noteholders' Protective Committee, as holder of $200,000 principal amount of Whiteside notes, filed a claim in the bankruptcy proceedings upon $200,000 of the unpaid balance of the purchase contract (R. 174-5). The bankruptcy court allowed the claim of the Duluth Bank as an individual in the sum of $100,000 and interest, and the claim of the Noteholders' Protective Committee in the sum of $200,000 and interest, as Class 3 claims (R. 177).

Before the Plan of Reorganization was filed the bankruptcy court made an order classifying claims in which

[1]Appendix, p. 16, II.

claims for the balance due under the purchase contract were designated as Class 3 (R. 223). In paragraph 2 of Class 2 of the classifying order provision was made for the discharge of the first mortgage which Debtor had assumed in the purchase contract (Ex. 9, R. 223). That mortgage, in accordance with the duly confirmed Plan of Reorganization was satisfied (R. 182).

The Plan of Reorganization (Ex. B to cross-complaint, R. 49) in express terms dealt with all assets, liabilities, securities, debts and interest of, in and against the Debtor (R. 52) and provided that a new corporation be organized (R. 56) which would take title to all property of the Debtor (R. 56). Pursuant to the latter provision Petitioner was incorporated (R. 180).

Under the heading "Secured Creditors" (R. 52) and the subheading "Creditors Holding Junior Liens" (R. 53), in the Plan of Reorganization, there was described the unpaid balance on the purchase contract in the principal amount of $300,000, together with accrued interest to December 1, 1934, in the sum of $52,250 (R. 53). Under the heading "Distribution of Securities—Secured Creditors" (R. 63) and the subheading "Creditors Holding Junior Liens C. Claims Arising on Notes of R. B. Whiteside," for which the entire unpaid balance of the purchase contract had been assigned by the instruments of assignment, the Plan of Reorganization provided:

> "These notes were made subsequent to the execution of the contract by which the company agreed to purchase the Whiteside tract and are secured by a pledge of said contract. The holders of these notes will receive income bonds, Series 'B,' in the sum of $105,000, 1,950 shares of Convertible Preferred Stock and 3,000 shares of Common Stock and will transfer title to the Whiteside tract to the reorganized company" (R. 64).

The Duluth Bank, both as trustee and as an individual claimant, and the Noteholders' Protective Committee filed written acceptances of the Plan of Reorganization (R. 177-8). Respondents filed no claim in the bankruptcy court and, except by filing an intervening petition hereinafter mentioned (R. 179), filed no formal written acceptance of the Plan of Reorganization.

At the hearing in the bankruptcy court upon the fairness and feasibility of the Plan, and before confirmation thereof, Respondents appeared and in open court expressed approval of the Plan of Reorganization (R. 175). By its order entered after hearing the court determined that the Plan of Reorganization was feasible, fair and equitable and did not discriminate in favor of or against any creditors or stockholders and that it complied with all of the applicable provisions of Section 77B of the Bankruptcy Act (R. 175-176, Ex. 17, R. 282, 283).

On February 19, 1937 (R. 177), the court made an order confirming the Plan of Reorganization (R. 177, Ex. 20, R. 293) which provided that the Plan of Reorganization and the provisions of such order be binding on the Debtor, all stockholders thereof and all creditors of the Debtor, whether secured or unsecured, whether or not affected by the Plan, whether their claims were *ex contractu* or *ex delicto,* whether their claims had been filed or not, and including claims of creditors who have not filed claims (R. 301-302). In the order the court found that the Plan had been accepted by stockholders and creditors in each class sufficient to authorize confirmation thereof (R. 300).

The Series "B" bonds, convertible preferred stock and common stock issued by Petitioner as prescribed by the Plan were distributed to the Duluth Bank and the Noteholders' Committee in satisfaction of claims for the entire unpaid balance on the purchase contract (R. 181), and the

balance due on the first mortgage assumed by the Debtor in the purchase contract was fully satisfied by payment thereof as prescribed by the Plan (R. 181-2, Ex. "B" attached to cross-complaint, R. 49, 64).

By its Final Decree (R. 179, Ex. 25, R. 327) the reorganization court (1) directed delivery of the escrowed deed to Petitioner (R. 331), (2) adjudged that each and all of the provisions of Section 77B touching the proceedings and all orders of the court had been duly complied with (R. 329), and (3) decreed that all creditors and stockholders of the Debtor be perpetually restrained and enjoined from instituting, prosecuting or pursuing any suits or proceedings on any claim (R. 330), and that the title to all of the assets be vested in Petitioner, free and clear of any lien or claim of any kind or nature (R. 331).

Notices were given from time to time during the course of all of the bankruptcy proceedings to all stockholders and creditors of all hearings upon all matters coming up before the court during the pendency of such proceedings and of all orders entered therein (R. 173, Ex. 9, R. 219, Ex. "B," 227, R. 174, Ex. 10, R. 238, R. 176, Ex. 17, R. 282, 283, 284).

The Intervention of Respondents in the Bankruptcy Proceedings.

On March 13, 1937 (R. 179), Respondents appeared generally and filed an intervening petition in the bankruptcy proceedings (R. 179, Ex. 23, R. 310), stating that they desired that the Plan of Reorganization be carried out in accordance with its terms (R. 323). They alleged that after a conference had been held between the Bondholders' Committee representing the first mortgage bonds of the Debtor, the Noteholders' Protective Committee, and the Duluth Bank (R. 314), the Noteholders' Protective

Committee, by letter to the Bondholders' Committee, in which the Duluth Bank and the Respondents joined, proposed an agreement to the terms of the Plan of Reorganization in so far as such provisions applied to them, subject to the approval of the Probate Court of St. Louis County, Minnesota (R. 314-315). It was further alleged that pursuant to an application by Respondents to the Probate Court of St. Louis County, Minnesota (R. 317), the Probate Court had made an order authorizing the Respondents to direct the Duluth Bank to deliver the escrowed deed when Detroit Trust Company, whose claim had been allowed against the estate in the Probate Court in the sum of $313,400 on September 29, 1932, and when the Duluth Bank, whose individual claim had been allowed against the estate in the amount of $106,986.30 on March 6, 1933, and the Noteholders' Protective Committee's claim which had been allowed on the same date for the sum of $212,808.22, shall have satisfied and discharged their claims (R. 318-319). The claim of Detroit Trust Company was based on the balance due on the first mortgage which, as above stated, was satisfied afterward in accordance with the Plan of Reorganization.

The order of the Probate Court (R. 176-7, Art. XVII of cross-complaint, R. 24) recited that the court did not assume jurisdiction over any claimants, and did not by its order adjudicate any rights of either the Detroit Trust Company or the Duluth Bank and that the order was not to be considered as prejudicing their rights as estate creditors (R. 25).

It was further alleged in the intervening petition that the Duluth Bank had advertised for sale the purchase contract pursuant to the terms of the two collateral trust agreements authorizing such sale (R. 320-321), the unpaid

balance on the purchase contract being the same as the unpaid balance on the Whiteside notes.

The relief prayed for was

(a) That the Duluth Bank, as trustee, be directed to satisfy its two claims allowed in the probate court;

(b) That the Duluth Bank, as escrowee of the deed, be directed to deliver the same, together with the $300,000 principal amount of Whiteside notes, to the trustees of the Debtor upon issuance to the persons entitled thereto of the income bonds, convertible preferred stock and common stock, as provided by the Plan of Reorganization;

(c) That the court make an order staying the sales pending a full and complete hearing;

(d) That the Duluth Bank, as trustee, be enjoined from selling the indebtedness transferred and held by it as security for the Whiteside notes; and

(e) That the Duluth Bank be directed to perform such acts necessary and proper for the consummation and carrying out of the Plan of Reorganization in so far as the same provided for action and performance upon its part (R. 324-325).

At the hearing of the intervening petition in the bankruptcy court on March 17, 1937, Respondents and other parties appeared and the court made an order in which it temporarily enjoined the threatened sale and reserved jurisdiction to hear and determine all matters set forth in the intervening petition in so far as it had jurisdiction to do so at the time of hearing upon the Final Decree to be entered in the reorganization proceedings or at such

other time as the court might fix (R. 179, Ex. 24, R. 326, 327).

Subsequently, the hearing on the Final Decree and upon the intervening petition were heard together, after which the court made two orders simultaneously on the 27th day of March, 1937 (R. 179-180), (1) the entering of its Final Decree, and (2) an order disposing of Respondents' intervention. Both by the record (Ex. 25, R. 332, Ex. 26, R. 333) and by stipulation of the parties (R. 180) such order and Final Decree were entered simultaneously on March 27, 1937.

The order entered on the intervention provided that the previous order of the court staying the sales was reaffirmed, and stated:

> "It appearing to the court that the other controversies involved in said intervening petition were more properly cognizable in the courts of Minnesota, it is further ordered that except as above provided said intervening petition be and it hereby is dismissed without prejudice, however, to the rights of said interveners and said respondents with respect to matters and things alleged in said intervening petition." (Ex. 26, R. 332-333.)

The Final Decree entered (Ex. 25, R. 327) contemporaneously with the order on the intervention discharged the Debtor from its debts and liabilities (R. 329), except as provided in the Plan of Reorganization, directed that the Duluth Bank (which held the deed conveying to Debtor the lands described in the purchase contract) should deliver the deed to Petitioner (R. 331), that the securities to be issued as required by the Plan should be held in lieu of the purchase contract and all payments due thereunder (R. 331), and that Petitioner should be vested with the title to all properties of the Debtor (R. 331).

The Judgment Below Sought to Be Reviewed was Final and was Rendered by the Highest Court of the State of California in which a Decision Could be had.

The District Court of Appeal reversed the judgment of the Superior Court directing that a judgment be entered adjudging Respondents to be the owners and holders of title to the lands described in the complaint, subject, however, to a lien thereon for any unpaid remainder of the Whiteside notes and subject, further, to the terms and conditions of the purchase contract (R. 447). Such judgment became final October 26, 1942, when the Supreme Court of California declined to hear the case (R. 455).

From the judgment rendered for Petitioner and against them by the Superior Court of Tuolumne County, California (R. 157), Respondents appealed to the Supreme Court of California (R. 162) under Section 4 of Article VI of the Constitution of California,[1] which provides that the Supreme Court of the state shall have appellate jurisdiction in all cases which involve the title or possession of real estate.

The Supreme Court of California, in pursuance of Section 4c of Article VI of the Constitution of California,[2] transferred the cause to the District Court of Appeal for the Third Appellate District of California (R. 433).

After hearing, the District Court of Appeal entered judgment on the 29th day of August, 1942, reversing the judgment of the Superior Court (R. 447). The opinion is reported 54 Advance Calif. App. Reports 290, 128 Pac. (2d) 899, and is printed in full in the Appendix.[3] Such judgment became final in the District Court of Appeal on

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[1]Appendix, p. 16, III.
[2]Appendix, p. 16-17, IV.
[3]Appendix, pp. 1-16.

the 28th day of September, 1942, by virtue of a provision of Section 4c of Article VI of the Constitution of California.[4]

On the 16th day of September, 1942, after service on respondents (R. 494), petitioner filed an Application for Rehearing in the District Court of Appeal (R. 448) pursuant to Section 1 of Rule XXX of the Supreme Court and District Court of Appeal of California[5], effective September 8, 1942, which permits the filing of such an application and requires that it be filed within twenty days after the judgment has been pronounced.

On the 28th day of September, 1942, the District Court of Appeal denied Petitioner's Application for Rehearing without opinion (R. 455).

On the 7th day of October, 1942 (R. 459), and within nine days after the judgment of the District Court of Appeal had become final in that court, Petitioner filed in the Supreme Court of California a printed Application for Hearing After Final Judgment of a District Court of Appeal (R. 459), in which it was prayed that the case be heard and determined by that court, and there was embraced therein a statement of the grounds upon which necessity for hearing was claimed to exist (R. 460) and specifically setting up and claiming the right, privilege and immunity of Petitioner under Section 77B of the Bankruptcy Act (R. 473) and that the Plan of Reorganization and Final Decree were *res judicata* as to Respondents' claims (*infra,* pp. 33-38; R. 475, 482-492); and which application was accompanied by a copy of the opinion of the District Court of Appeal in said cause (R. 493, 434, side page 784), showing the date of filing thereof, together with proof of service on Respondents prior to the filing of said application and proof of service

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[4]Appendix, pp. 16-17, IV.
[5]Appendix, p. 17, V.

thereof (R. 495). Said application was permitted and authorized and was filed pursuant to Sections 3[6] and 6[6] of the Rules of the Supreme Court and District Court of Appeal of the State of California and pursuant to Section 4c of Article VI[7] of the Constitution of California.

On the 26th day of October, 1942, the Supreme Court of California, being the highest court of the state, overruled said Application for Hearing After Final Judgment of a District Court of Appeal, without opinion, thereby refusing to hear said cause, and said judgment on said date thereupon became final (R. 455).

II.

STATEMENTS PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE COURT BELOW.

The Statutory Provision Believed to Sustain this Court's Jurisdiction.

This Court has jurisdiction to issue the writ of certiorari pursuant to subsection (b) of Section 237 of the Judicial Code, as amended (Section 344, Title 28, U. S. C. A., Section 1, 43 Stat. 937), which provides that:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had • • • where any title, right, privilege, or immunity is specially set up or claimed by either party under the

[6]Appendix, pp. 17, 18, VI, VII.
[7]Appendix, pp. 16, 17, IV.

Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States * * *."

The Statute of the United States or Commission or Authority exercised under the United States under which Title, Right, Privilege or Immunity was set up or claimed by Petitioner.

The Statute of the United States under which the title, right, privilege or immunity as specifically set up and claimed by Petitioner was denied and the validity of which is involved is Section 77B of the Bankruptcy Act of June 7, 1934, c. 424; Section 1, 48 Stat. 912; Act of August 20, 1935, c. 577, 49 Stat. 664; Act of August 29, 1935, c. 809, 49 Stat. 965; Act of August 12, 1937, c. 589, Section 1, 50 Stat. 622, the pertinent provisions of which are as follows:

Subsection (e) (1):

"A plan of reorganization shall not be confirmed until it has been accepted in writing, whether before or after the filing of the petition or answer under this section, and such acceptance shall have been filed in the proceeding by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan * * *."

Subsection (b):

"A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; * * * (9) shall provide adequate means for the execution of the plan, which may include the transfer of all or any part of the property of the debtor to another corporation * * * the satisfaction or modification of liens * * * and the issuance of securities

of either the debtor or any such corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; (10) may deal with all or any part of the property of the debtor and may include any other appropriate provisions not inconsistent with this section * * *. The term 'creditors' shall include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this title. The term 'claims' includes debts, securities other than stock, liens, or other interests of whatever character."

Subsection (g):

"Upon such confirmation the provisions of the plan and of the order of confirmation shall be binding upon (1) the debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) all creditors, secured and unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it."

Subsection (h):

"Upon final confirmation of the plan, the debtor and other corporation * * * organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto * * * and the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the * * * other corporation * * * provided for by the plan * * * shall be free and clear

> of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance * * * and the court may direct * * * the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance * * *. Upon the termination of the proceedings a final decree shall be entered * * * closing the case. Such final decree shall discharge the debtor from its debts and liabilities * * * except as provided in the plan or as may be reserved as aforesaid."

The court below denied Petitioner's right, title, claim, interest and immunity under Section 77B of the Bankruptcy Act as specifically set up and claimed in Petitioner's plea that title to the lands in question were vested in it because of the statute and the bankruptcy proceedings conducted thereunder, and by denying that Respondents' claims to title to the lands as asserted in this case were *res judicata* because of the Plan of Reorganization, as confirmed, and the Final Decree rendered by the bankruptcy court in the bankruptcy proceedings.

This Court has jurisdiction to review the judgment of the court below under Section 237(b) of the Judicial Code, as amended, because of the denial by that court of the right, title, privilege and immunity specifically set up and claimed by Petitioner under Section 77B of the Bankruptcy Act and the denial by the court below of Petitioner's plea of *res judicata* that the orders and Final Decree of the bankruptcy court were conclusive as to the claims of title asserted by Respondents in this case.

III.

QUESTIONS PRESENTED AND THE REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT, AND STATEMENT OF GROUNDS UPON WHICH IT IS CONTENDED THAT THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

The Questions Presented.

The questions presented for the determination of this Court are:

1. Did the Plan of Reorganization, as confirmed, and the Final Decree entered by the bankruptcy court in the bankruptcy proceedings of Pickering Lumber Company vesting title to the lands in question in Petitioner and barring Respondent's claims constitute a final adjudication of Respondents' claims to the real estate asserted in this case when the admitted facts disclose (a) that the real estate was in the possession of the Debtor when its bankruptcy petition was filed, (b) that Respondents had notice of the proceedings and appeared generally in such bankruptcy proceedings, and (c) that Respondents in the bankruptcy proceedings made no challenge either as to the jurisdiction of the bankruptcy court or as to the validity of its adjudication?

2. May Respondents in this suit, which was filed subsequent to the termination of the bankruptcy proceedings, successfully maintain that the bankruptcy court had no jurisdiction to adjudicate title in Petitioner to the real estate in possession of the bankruptcy court and to bar Respondents' claims with reference thereto when Respondents, who admittedly received notices of the hearings in the bankruptcy proceedings and appeared therein but filed no claim, made no challenge in the bankruptcy proceedings to the exercise of jurisdiction by that court

and took no appeal from the order of confirmation or from such Final Decree of the bankruptcy court?

3. Is the determination of its jurisdiction by the bankruptcy court to adjudicate title to the real estate and to bar Respondents' claims thereto subject to successful challenge by Respondents in this case subsequently filed when, under the admitted facts disclosed by the record in this case, the real estate was in the custody of the court, Respondents participated in the bankruptcy proceedings, had full knowledge of such intended adjudication and made no challenge to the exercise of such jurisdiction by the bankruptcy court and took no appeal from the order of confirmation or from such Final Decree?

4. Were Respondents parties to the bankruptcy proceedings because of the notices which were admittedly given to them and their unreserved appearance in the bankruptcy court in the bankruptcy proceedings?

5. May Respondents successfully maintain in this suit, filed subsequent to the termination of the bankruptcy proceedings, that the order dismissing their intervening petition in part entered simultaneously with the Final Decree, had the effect of terminating their relation to the bankruptcy proceedings as parties so that the Final Decree of the bankruptcy court did not bind them?

6. Is the adjudication of title in Petitioner and the barring of Respondents' claims to the real estate by the bankruptcy court in the Plan of Reorganization and Final Decree conclusive and not subject to challenge by Respondents in this suit filed subsequent to the termination of the bankruptcy proceedings, when the admitted facts disclose that the bankruptcy court had before it as parties the Duluth Bank as escrowee of the deed and as assignee of the purchase contract, the Noteholders' Protective Committee, *cestui que trustent,* and Respondents, who were all

of the claimants to the real estate, and none of whom challenged such adjudication in the bankruptcy proceedings?

7. May Respondents in this suit, filed subsequent to the termination of the bankruptcy proceedings, successfully challenge the adjudication of the bankruptcy court that the Duluth Bank and the Noteholders' Protective Committee, by virtue of the instrument of assignment assigning the entire unpaid balance on the purchase contract to it in its individual capacity and as trustee for the Whiteside noteholders, executed by Respondents' decedent, were vested with authority to file claim for the entire unpaid balance on the purchase contract and to accept such Plan of Reorganization, thereby binding Respondents and to have such purchase contract obligation satisfied and discharged by the delivery of the securities to the Duluth Bank, as provided in the Plan of Reorganization?

8. The effect of the bankruptcy adjudication being that the entire interest of Respondents' decedent in the purchase contract was assigned to the Duluth Bank and it was clothed with authority to collect the entire unpaid balance on the purchase contract, and its claim therefor having been fully satisfied in the bankruptcy proceedings, are Respondents, who had notice of the bankruptcy proceedings and who participated therein, barred from asserting any claims to the real estate in this case filed subsequent to the termination of the bankruptcy proceedings?

9. May the court below in this case, which was instituted subsequent to the termination of the bankruptcy proceedings, determine the case the same as if it were an appellate court and thereby subject the bankruptcy proceedings to such review and consideration as if the bankruptcy proceedings were before it upon appeal or other direct review?

The Reasons Relied Upon for the Allowance of the Writ.

This Court has jurisdiction under Section 237(b) of the Judicial Code, as amended, to grant certiorari because the decision and judgment of the court below denied Petitioner a right, title, interest, privilege and immunity under Section 77B of the Bankruptcy Act (Title 11, U. S. C. A., Section 207) and under the orders and Final Decree of the bankruptcy court in the bankruptcy proceedings for the reorganization of Pickering Lumber Company conducted under authority of such statute, as specifically set up and claimed by Petitioner. The jurisdiction of this Court to grant certiorari on such ground is sustained by the following decisions:

Stoll v. *Gottlieb*, 305 U. S. 165, 167;
Davis v. *Aetna Acceptance Corp.*, 293 U. S. 328;
Connell v. *Walker*, 291 U. S. 1;
Danciger & Emerich Oil Co. v. *Smith*, 276 U. S. 542;
Myers v. *International Trust Co.*, 273 U. S. 380;
Jones Nat'l Bank v. *Yates*, 240 U. S. 541;
Harrigan, Trustee, v. *Bergdoll*, 270 U. S. 560;
Nutt v. *Knut*, 200 U. S. 12;
Rankin v. *Barton*, 199 U. S. 228;
Fischer v. *Pauline Oil Co.*, 309 U. S. 294;
Lesser v. *Gray*, 236 U. S. 70;
Seabury, Receiver, v. *Green*, 294 U. S. 165;
Williams v. *Heard*, 140 U. S. 529, l. c. 535;
Rector v. *City Deposit Bank*, 200 U. S. 405;
Eauclaire Nat'l Bank v. *Jackman*, 204 U. S. 522;
Motlow v. *State ex rel. Koeln*, 295 U. S. 97, 98;
Pittsburgh, C., C. & St. L. Ry. Co. v. *Long Island Loan & Trust Co.*, 172 U. S. 493, 507.

In denying Petitioner's defense that the Plan of Reorganization, as confirmed, and the Final Decree entered in the bankruptcy proceedings barred Respondents from

asserting any claims to the real estate and that such Plan of Reorganization and Final Decree were *res judicata* of the rights asserted and claimed by Respondents in this suit, the court below denied to Petitioner a right, title, interest and immunity which depended upon Section 77B of the Bankruptcy Act and an order of confirmation and a Final Decree of a District Court of the United States rendered in proceedings conducted pursuant thereto. This Court is thereby given jurisdiction to grant certiorari under subsection (b) of Section 237 of the Judicial Code, as amended. The authorities *supra* sustain such jurisdiction.

Statement of Grounds upon which it is contended that the Questions Involved are substantial.

The questions involved are substantial, not only as to the rights of Petitioner derived from the pertinent bankruptcy statutes and the bankruptcy proceedings but because of their paramount public importance. The court below has refused to give effect to a confirmed Plan of Reorganization and a final decree of a bankruptcy court adjudicating title to real estate in Petitioner and barring Respondents' claims thereto, when the admitted facts disclose that the real estate was in the possession of the bankruptcy court and all persons having claims thereto were parties to the proceedings. The court below has sustained Respondents' collateral attack on the order of confirmation and the Final Decree of the bankruptcy court and has denied Petitioner's plea that the bankruptcy proceedings adjudicated all of Respondents' claims so that they could not be asserted subsequently in this suit.

The court below has ruled that the bankruptcy proceedings were ineffective to discharge obligations for which specific provision was made in the Plan of Re-

organization and which has been satisfied in accordance with the provision so made. Contrary to specific provision in the order confirming the Plan of Reorganization and Final Decree, the court below in its decision of this case held that Respondents' claims to the real estate were not affected thereby. The court below has held that Respondents, who had notice of the proceedings, who participated therein and intervened, were not parties to the proceedings when the Final Decree was entered because their intervening petition, which made no reservation of jurisdiction, was dismissed in part, and that, as a consequence, the bankruptcy court's jurisdiction over Respondents terminated with the dismissal in part of the intervening petition so that the Respondents were not bound by the Final Decree entered contemporaneously with such dismissal.

The bankruptcy court had determined its jurisdiction and had adjudicated rights of parties to the proceedings, but under the ruling of the court below such adjudication is subject to challenge by a state court whenever the bankruptcy decree is invoked. Thus the questions litigated in the bankruptcy court must be relitigated at the instance of any creditor or stockholder, and not until the gamut of creditors and stockholders is run is it known what effect, if any, the bankruptcy adjudication had. The rights conferred by the federal statute and the bankruptcy proceedings conducted thereunder are thereby denied because the probability of such rights being given effect depends ultimately upon the decision of a state court and not upon the statute or order of confirmation or the final decree of a federal bankruptcy court.

If a state court may thus deal with Section 77B of the Bankruptcy Act and the final decree of a bankruptcy court, then the objectives of Congress in enacting the

statute to rehabilitate debtors by freeing them from burdensome obligations have been frustrated and proceedings of a bankruptcy court are of no effect until their validity has been sustained by a state court. It is difficult to conceive of a more effective method of avoiding Section 77B of the Bankruptcy Act and denial of rights expressly conferred in proceedings conducted in pursuance thereof.

This Court should grant the writ of certiorari because (1) the court below has denied a right, title, privilege and immunity specifically set up and claimed by Petitioner under Section 77B of the Bankruptcy Act and Petitioner's defense of *res judicata* of the orders and Final Decree of the bankruptcy court to Respondents' claims asserted in this case and (2) the questions involved are of importance in the administration of the bankruptcy statutes.

IV.

THE STAGE IN THE PROCEEDINGS IN THE COURT OF FIRST INSTANCE AND APPELLATE COURTS IN WHICH AND THE MANNER IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE SPECIFICALLY SET UP AND CLAIMED, AND THE WAY THEY WERE PASSED ON BY THE COURTS BELOW.

The Stage in the Proceedings and the Manner in which the Federal Questions Sought to be Reviewed were specifically Set Up and Claimed.

A.

In the Court of First Instance.

In its amended answer to the cross-complaint (R. 117) Petitioner specifically alleged the Plan of Reorganization, its acceptance and confirmation, the final decree, the order classifying claims, the intervention and the proceedings pursuant thereto, and all other pertinent proceedings of the

bankruptcy court (R. 117-118, 128-135). It was alleged also that there was a final discharge of the purchase contract and title to the lands were vested in Petitioner because of the Plan and final decree (R. 127, 135). It was further asserted that the final decree and Plan of Reorganization were *res judicata* to all of Respondents' claims of title as were asserted by it in its cross-complaint. In addition to the allegation of specific facts, the plea of *res judicata* was specifically set up and claimed by the following allegations of the amended answer.

> "Said (final) decree constituted a final judgment entered by a court of competent jurisdiction in a suit to which this plaintiff was privy as successor to Pickering Lumber Company, and in which these defendants were parties, and by said final decree it has been finally adjudicated that the defendants have no right, title or interest in, to or against any of the property of this plaintiff or any of the property of Pickering Lumber Company, and that defendants have no claim or demands against this plaintiff or any of its property, and the defendants are by said decree estopped to claim and enjoined from claiming any right, title or interest in or to the property described in plaintiff's complaint." (Tr. 126-7.)
>
> "By virtue of said confirmation of said plan of reorganization, the provisions of said plan, and said order of confirmation, became binding upon all creditors of Pickering Lumber Company, both secured and unsecured, and whether or not affected by said plan, and whether or not their claims have been filed, and including creditors who had not, as well as those who had, accepted the plan, and in the manner and form aforesaid, if the defendants, as executors of the last will and testament of Robert B. Whiteside owned any interest in the obligation of Pickering Lumber Company to pay the balance of the purchase price for the lands described in plaintiff's complaint, then such right, title or interest has been fully dis-

charged by said plan of reorganization, the confirmation thereof, and said final decree in said proceedings under Section 77B of the Bankruptcy Act. (R. 127.)

"In the manner and form aforesaid, the interest of First & American National Bank of Duluth, as trustee, the interest of all the holders of the notes executed by Robert B. Whiteside, and the interest, if any, of the defendants, as executors of the estate of Robert B. Whiteside, in the obligation of Pickering Lumber Company to pay the balance of the purchase price for the lands described in plaintiff's complaint, have all been fully discharged, and Pickering Lumber Company and this plaintiff have been discharged from said obligation and said obligation no longer exists, and by reason thereof the title which Pickering Lumber Company acquired to the lands described in plaintiff's complaint by the execution of a contract dated January 5, 1927, which title has been acquired by this plaintiff by reason of the provisions of said plan of reorganization and the confirmation thereof, is free of the lien reserved and provided for in said contract dated January 5, 1927, said lien and the obligation thereby secured are fully discharged and satisfied, and defendants have no right, title or interest in said real estate, either by lien or otherwise." (R. 127.)

"Said order (to deliver the deed) constituted a final judgment in said proceedings upon the intervening petition filed by the executors of the last will and testament of Robert B. Whiteside, deceased, in said District Court of the United States for the Western District of Missouri, and from said final judgment no appeal was taken and said judgment was entered in a proceeding to which this plaintiff is a privy as the successor of Pickering Lumber Company and to which Pickering Lumber Company was a party and to which the defendants in this suit and First & American National Bank of Duluth, both individually and as trustee, and said Noteholders' Protective Committee were all parties, and said decree is *res adjudicata* and is binding upon all said parties." (R. 132.)

"If any right, title or interest in the real estate described in plaintiff's complaint remained in Robert B. Whiteside or Sophia Whiteside, his wife, after the execution and delivery of the contract dated January 5, 1927 (which plaintiff denies), then said right, title or interest was conveyed to this plaintiff by the delivery of said deed to this plaintiff by First & American National Bank of Duluth, as trustee, theretofore held in escrow and said delivery was with the consent and at the direction and request of defendants and pursuant to said final decree which was binding upon them and which was rendered by said District Court of the United States for the Western District of Missouri in proceedings which they had instituted in said court and which decree was rendered at their instance and request, and from which they took no appeal and which was *res adjudicata* as to them and as to this plaintiff as privy and successor to Pickering Lumber Company." (R. 135.)

The Superior Court, being the court of first instance, sustained Petitioner's title thus asserted and entered judgment for it but without opinion (R. 157).

B.

In the District Court of Appeal.

The case was heard by the District Court of Appeal on Respondents' appeal thereto and that court, as is heretofore shown (*supra,* p. 16), decided such federal right and title adversely to Petitioner. In its Petition for Rehearing the federal right was specifically claimed and set up as follows:

"1. Because the Court in holding that the bankruptcy court, namely, the District Court of the United States for the Western District of Missouri, did not adjudicate the question here involved, did so in mis-

apprehension of the facts, which misapprehension is shown by the statement of facts in the opinion the court filed on August 27, 1942 (R. 448).

2. Because the court overlooked this respondent's contention that the First and American National Bank, as Trustee, had legal title to the obligation of Pickering Lumber Company to pay the balance of the purchase price for the timber land in question, and as such trustee had the right to accept the Plan of Reorganization of Pickering Lumber Company, and the right to discharge the purchase price obligation by receiving securities issued by Pickering Lumber Corporation, pursuant to such a plan of reorganization, and that the discharge of the purchase price obligation had the same effect as payment thereof; so that such discharge vested the legal title to the lands in question in Pickering Lumber Company's successor, namely, this respondent. (Petition for Rehearing, R. 448.)

3. * * * but the Court overlooked the contention made by respondent that when the purchase price obligation was discharged by the execution of the plan of reorganization and by the delivery of the securities of Pickering Lumber Corporation to the trustee (who had the right to receive whatever was due in composition of the purchase price obligation) then the liability upon the purchase price obligation was fully satisfied and discharged. This discharge had identically the same effect as payment in full. Therefore the discharge of the purchase price obligation automatically vested the title to the real estate in the successor of the Pickering Lumber Company, namely, this respondent. (Petition for Rehearing, R. 453.)

4. The effect of this Court's opinion is that the bankruptcy court had no jurisdiction to deal with the satisfaction, discharge or composition of Pickering Lumber Company's debt represented by the unpaid purchase price obligation, notwithstanding the fact that the trustee and the Whiteside note holders who

had both the legal and beneficial title and interest had filed claims thereon and accepted the plan of reorganization, and the Whiteside executors, who were not entitled to collect the purchase price, had accepted the plan by their prayer that it be carried into effect. If Mr. Whiteside had never assigned the purchase price obligation, but had entered his appearance and asked that the plan be executed, he would have received exactly what his assignee received, namely, the securities in discharge of the debt due from Pickering Lumber Company. (Petition for Rehearing, R. 453.)

5. * * * that this Court, in view of the true facts, determine anew the effect of the orders and judgments of the District Court of the United States for the Western District of Missouri upon the rights of the parties hereto; that this Court consider and determine anew the right of the bankruptcy court to discharge Pickering Lumber Company's obligation to pay the balance of the purchase price for the real estate in question, and the right of First and American National Bank of Duluth, as trustee, to discharge such obligation by the receipt of securities issued by Pickering Lumber Corporation." (Petition for Rehearing, R. 454.)

C.

In the Supreme Court of California.

In Petitioner's Application for Hearing After Final Judgment of a District Court of Appeal filed in the Supreme Court of California the federal questions sought to be reviewed were set up, and the manner in which the same were specifically set up and claimed, were:

"1. The District Court of Appeal, by its opinion rendered in this cause, erroneously denied, ignored and refused to enforce the provisions of Section 77B of the Bankruptcy Act and in that manner denied, ignored and refused to enforce a title and right

claimed and specifically set up by the respondent under said federal statute. The pertinent parts of Section 77B of the Bankruptcy Act which the District Court of Appeal denied, ignored and refused to enforce are as follows (all italics are ours):

Subsection (e)(1) provides that:

'*A plan of reorganization shall not be confirmed until it has been accepted in writing,* whether before or after the filing of the petition or answer under this section, and such acceptance shall have been filed in the proceeding *by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan* * * *.'

Subsection (b) provides that:

'*A plan of reorganization* within the meaning of this section (1) *shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise;* * * * (9) shall provide adequate means for the execution of the plan, which may include the transfer of all or any part of the property of the debtor to another corporation * * * the satisfaction or modification of liens * * * and the issuance of securities of either the debtor or any such corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; (10) *may deal with all or any part of the property of the debtor* and may include any other appropriate provisions not inconsistent with this section * * *. *The term "creditors" shall include,* for all purposes of this section and of the reorganization plan, its acceptance and confirmation, *all holders of claims of whatever character against the debtor or its property,* including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this title. The term "claims" includes debts, securities

other than stock, liens, or other interests of whatever character.'

Subsection (g) provides that:

'*Upon such confirmation the provisions of the plan and of the order of confirmation shall be binding upon* (1) the debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) *all creditors, secured and unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it.*'

Subsection (h) provides that:

'Upon final confirmation of the plan, the debtor and other corporation * * * organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto * * * *and the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the * * * other corporation * * * provided for by the plan * * * shall be free of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved under the order confirming the plan* or directing such transfer and conveyance * * * and the court may direct * * * the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance * * *. Upon the termination of the proceedings a final decree shall be entered * * * closing the case. Such final decree shall discharge the debtor from its debts and liabilities * * * except as provided in the plan or as may be reserved as aforesaid.' (R. 473-475.)

2. In its opinion the Distract Court of Appeal treated the case as though the above-mentioned provisions of Section 77B had never been enacted. It treated the question of the effect of reorganization as though it were a mere question of common law

accord and satisfaction to which defendants had not agreed. The court totally ignored plaintiff's claim that under the provisions of Section 77B of the Bankruptcy Act the acceptance of the plan of reorganization by the bank as trustee and by the Whiteside noteholders was binding upon the whole class of creditors to which defendants belong (R. 475).

3. The District Court of Appeal held that defendants, as executors of the last will of Robert B. Whiteside, retained title to the land in question as security for the payment of the balance due upon the purchase price.

However, the possession of the bankrupt becomes the possession of the bankruptcy court when bankruptcy proceedings are instituted (R. 475-476). * * *

Thereafter, the right of possession and the title may be disputed and adjudicated; but the question as to whether the dispute shall be in the bankruptcy court or in some other court is resolved by the question of whether the bankrupt (or its receiver) was in or out of possession when bankruptcy intervened. Whether Pickering Lumber Company had title was one of the questions which the bankruptcy court, and no other court, had jurisdiction to decide (R. 476-477).

It follows that the bankruptcy court had jurisdiction of the subject-matter, namely, the real estate (R. 477).

4. The District Court of Appeal, ignoring the provisions of Section 77B of the Bankruptcy Act and treating the whole reorganization as a common law proceeding, said:

'Who were the parties to the compromised plan of purported accord and satisfaction? The Whiteside estate was not a party thereto because its acceptance thereof was conditional upon full satisfaction of the Whiteside note obligations, which condition was never complied with.' (R. 478.)

Subsection (e) (1) of Section 77B only requires that a plan of reorganization shall be accepted

'by or on behalf of creditors holding two-thirds in

amount of the claims of each class whose claims have been allowed and would be affected by the plan.'

Subsection (b) of that statute provides that

'* * * the term "creditors" shall include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts * * *. The term "claims" includes debts, securities other than stock, liens, or other interests of whatever character.'

Subsection (g) provides that

'Upon such confirmation (of the plan of reorganization) the provisions of the plan and of the order of confirmation shall be binding upon * * * all creditors, secured and unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, *including creditors who have not, as well as those who have, accepted it.*' (R. 478-479.)

5. The bankruptcy court had jurisdiction *in rem* to determine title to the land, because both possession and beneficial ownership of the land were vested in the bankrupt, and all jurisdictional requirements of Section 77B of the Bankruptcy Act were fully complied with. The District Court of Appeal ignored this point. The District Court of Appeal thus denied a right claimed by plaintiff under a judgment of a federal court made pursuant to a federal statute, which right had been set up in the pleadings and briefs. (R. 492.)

6. The bankruptcy court also had jurisdiction *in personam* because the defendants were in court as interveners at the time the bankruptcy court determined title to the land pursuant to the prayer of their petition in intervention. They were not, as stated in the opinion of the District Court of Appeal, dismissed from court the day before such determination was made. The holding of the District Court of Appeal that the bankruptcy court had no jurisdiction

in personam is based entirely upon the mistaken belief that the bankruptcy court dismissed the petition in intervention (and thus lost jurisdiction of the defendants) *before* it entered the final decree, in which it determined title to the land in accordance with the prayer of that petition; whereas the uncontradicted evidence and the stipulation of the parties is to the effect that the two orders were entered simultaneously. Moreover, even if the petition in intervention had been dismissed before the entry of the final decree, or had never been filed at all, the bankruptcy court still had jurisdiction of the defendants because their attorney appeared at the hearing on the plan of reorganization and in open court expressed approval of the plan. And finally, if the District Court of Appeal had been right in holding that the only adjudication in favor of the executors was that the sale of the purchase price obligation be enjoined, that judgment alone would have made the title *res adjudicata* in this proceeding." (R. 492-493.)

The way in which the federal questions specifically set up and claimed were passed upon by the courts below.

By the Superior Court of Tuolumne County, California.

The Superior Court of Tuolumne County, California, entered judgment for Petitioner, without opinion, but with findings of fact sustaining Petitioner's claims. (R. 151.)

By the District Court of Appeal.

The District Court of Appeal, in dealing with the bankruptcy proceedings of Pickering Lumber Company conducted pursuant to Section 77B of the Bankruptcy Act, stated:

"Who were the parties to the compromise plan or purported accord and satisfaction? The Whiteside estate was not a party thereto because its acceptance thereof was conditional upon full satisfaction of the

Whiteside note obligations, which condition was never complied with. Therefore, the only parties to this compromise, insofar as it affects this case, were the Duluth Bank and Pickering Lumber Company, the bankrupt corporation." (R. 441.)

The opinion states that Petitioner

"did agree to issue and deliver, and did so issue and deliver to Duluth Bank, a creditor of the bankrupt corporation, certain of its stocks and securities, and Duluth Bank did agree to deliver to the reorganized corporation, and did deliver, the deed to the Whiteside tract, which it held in escrow, but was authorized to deliver only upon full payment of the purchase price of the Whiteside tract according to the contract of January 5, 1927." (R. 441-442.)

The opinion states that:

"We believe that the attempt of the bank to pass title to the land it did not own was futile, as was the attempt to separate the mortgage from the mortgage debt." (R. 442.)

Also that:

"The equitable mortgage lien will subsist until the debt it was given to secure (Whiteside notes) is paid in full." (R. 442.)

The opinion states that:

"On March 26, 1937, the petition in intervention was heard and the order of March 17th was reaffirmed, otherwise the court dismissed the intervening petition 'without prejudice' however to the rights of said interveners (Whiteside executors) and respondents (First and American National Bank of Duluth and the members of the Whiteside Noteholders Commit-

tee) with respect to the matters and things alleged in said intervening petition. On March 27, 1937, the bankruptcy court entered its final decree in the reorganization proceedings adjudging, among other things, that the bank deliver the deed it held in escrow, and that 'the securities issued * * * in exchange for said deed, shall be delivered to said First and American Bank of Duluth to be held by said bank in lieu of the collateral represented by said contract dated January 5, 1927, and the payments due thereunder.' " (R. 438.)[1]

The opinion states that:

"There is no doubt that if it (the reorganization court) had acquired jurisdiction over the parties, it had the right to require the contract to be performed; and if and when the contract was performed, to direct the delivery of the deed. It also had a right to direct a foreclosure on the securities held in the security transaction, as the security holder (the bank) had submitted to its jurisdiction; but it had no jurisdiction over the Whiteside executors without bringing them in by proper process, or unless they voluntarily submitted to its jurisdiction." (R. 444.)

The opinion also stated:

"in this case the Whiteside executors came before the bankruptcy court by filing petition in intervention to enjoin the bank from the threatened sale of securities unless it satisfied the claims which it had filed against the Whiteside estate. It is perhaps true that the bankruptcy court might have then tried, determined and adjudicated the issues between the bank and the Whiteside executors as to the right to the

[1]The statement of the court that the intervention was heard on March 26th is in direct contravention of the stipulation of the parties that the order on the intervention and the Final Decree were entered simultaneously March 27, 1937. (R. 180.)

delivery of the deed. If it can fairly be said it did this, the judgment of the bankruptcy court is *res adjudicata* and, although perhaps erroneous, is a bar to defendants in this action; but if, as appears to be the case, the petition was dismissed without prejudice, nothing was adjudicated thereby as against the interveners * * * and they have no right to appeal and are not barred thereby. * * * The question to be determined then is: Did the bankruptcy court adjudicate the question here involved? The order of March 17, 1937, was that the bank should withdraw and discontinue the sale, and 'that the rights of said respondents (the bank and Noteholders Committee) with respect to the matters and things alleged in interveners' petition herein shall not thereby be prejudiced'; that is, the bank, noteholders and Whiteside executors were relegated to the same situation they had occupied before the notice of sale was started, and the court, in said order, reserved 'jurisdiction to hear and determine, insofar as it had jurisdiction to do so, all matters and things set forth in said intervening petition, at the time of the hearing upon the final decree in said reorganization proceedings.' On March 26, 1937, further hearing on interveners' petition was had. The court reaffirmed its former order, insofar as it had ordered withdrawal and discontinuance of the sale by the bank, reciting that 'it appearing to the court that the other controversies involved in said intervening petition are more properly cognizable in the courts of Minnesota.' * * * After this, the final decree was made directing the delivery of the deed in exchange for the securities mentioned but when, as was the case, the interveners' petition was dismissed 'without prejudice,' interveners were no longer before the court. They were not parties. They had filed no claim in the bankruptcy proceedings. They had no right to appeal, and the court had no power to take title to their land away from them. Assuming that the bankruptcy court did have a right to order the bank to deliver the deed, which

> we believe it could not do without having the Whiteside executors as parties to the proceedings, it could not adjudicate their property rights. Therefore, the defendants are not bound by the decree in bankruptcy. * * * Therefore, we determine that the defendants hold title to the Whiteside Tract, subject to an equitable mortgage lien thereon for any unpaid remainder of the Whiteside notes, and also subject to the contract of January 5, 1927; and that the deed of record was delivered without authority and conveys no title to the lands therein described and will not become effective to transfer title until the full contract price is paid according to the terms of said contract of purchase." (R. 444-446.)[1]

The foregoing rulings of the court were of a nature to bring the case within the provisions of Section 237(b) of the Judicial Code, as amended, in that in said decision the District Court of Appeal denied the right, title and interest asserted by Petitioner under Section 77B of the Bankruptcy Act and the bankruptcy proceedings of the Debtor conducted in pursuance thereof that it was vested with title to the lands in question and that Respondents' claims upon the purchase contract had been barred and rejected Petitioner's plea of *res judicata.*

By the Supreme Court of California.

The Supreme Court of California refused to hear the cause and denied Petitioner's application for hearing without rendering any opinion. (R. 455.)

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[1]The court erroneously assumed that at the time the Final Decree was entered an order had been made dismissing in part the intervening petition. According to the stipulation of the parties and the record, it is shown that the Final Decree and order were entered simultaneously on March 27, 1937. (R. 180.) Such dismissal in part did not vacate the permanent injunction procured by the interveners.

V.

Prayer.

Wherefore, it having been shown that this Court has jurisdiction to review the judgment of the court below under subsection (b) of Section 237 of the Judicial Code, as amended, because Petitioner has been denied a right, title, claim, privilege and immunity under subsections (a), (b), (e) and (h) of Section 77B of the Bankruptcy Act (Title 11, U. S. C. A., Sec. 207) specifically set up and claimed by Petitioner and that such federal right also has been denied, because of the rejection of Petitioner's plea that the Plan of Reorganization, as confirmed, and Final Decree were *res judicata* as to Petitioner's title and the barring of Respondents' claims to the real estate, your Petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Judges of the District Court of Appeal for the Third Appellate District of the State of California, commanding them to certify and send to this Court the transcript of the record in this case, to the end that the judgment of said court may be reviewed and reversed and that your Petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

PICKERING LUMBER CORPORATION.

By MORRIS E. HARRISON,
PAUL BARNETT,
HENRY N. ESS,
Its Counsel.

State of Missouri, County of Jackson—ss.

PAUL BARNETT, being duly sworn, upon his oath deposes and says:

I am one of counsel for the Petitioner herein. I have read the foregoing petition and know the contents thereof, and the statements of fact contained therein are true to my knowledge. This verification is made by me because the facts of the foregoing petition are within my personal knowledge.

Paul Barnett

PAUL BARNETT

Sworn to and subscribed before me this 28 day of December, 1942.

TRIXIE SMITH,
Notary Public within and for
Jackson County, Missouri.

My commission expires October 6, 1944.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and the case is one in which the prayer of Petitioner should be granted by this Court.

Paul Barnett

PAUL BARNETT,
Counsel for Petitioner.